

# Saint Louis University Law Journal

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Volume 58  
Number 1 *Teaching Employment and Labor  
Law (Fall 2013)*

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Article 5

2013

## Employment Law Inside Out: Using the Problem Method to Teach Workplace Law

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### Recommended Citation

Rachel Arnow-Richman, *Employment Law Inside Out: Using the Problem Method to Teach Workplace Law*, 58 St. Louis U. L.J. (2013).  
Available at: <https://scholarship.law.slu.edu/lj/vol58/iss1/5>

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**EMPLOYMENT LAW INSIDE OUT: USING THE PROBLEM  
METHOD TO TEACH WORKPLACE LAW**

RACHEL ARNOW-RICHMAN\*

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## INTRODUCTION

Workplace law courses, like most law school courses, are generally taught via the case method.<sup>1</sup> The professor assigns students a series of appellate court decisions, the students read and prepare the cases in advance of class, the professor engages the students in a dialogue about the intricacies of the decisions they have read, and by the end of class students realize both the legal principles established in those decisions, as well as how and why the courts reached their particular conclusions.<sup>2</sup> This technique has been the *sine qua non* of legal education since the late nineteenth century. Like the Socratic dialogue with which it is often paired, the case method is not without its critics.<sup>3</sup> Yet it

1. I use the term “workplace law” to refer to the full curriculum of labor and employment law courses, including Employment Law, Employment Discrimination, and Labor Law, as well as “specialty” or “advanced” courses covering particular aspects of these subjects. In this article I focus on the use of the problem method in the basic employment law course as that has been the site of my experimentation with the methods, but it can be deployed in other workplace law courses as well. *See, e.g.*, Jeffrey A. Van Datta, *Collaborative Problem-Solving Responsive to Diverse Learning Styles: Labor Law as an Active Learning Experience*, 24 N.C. CENT. L.J. 46, 59–74 (2001) (discussing use of problem method, as well as other active learning techniques in teaching labor law).

2. *See* WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 2 (2007) [hereinafter THE CARNEGIE REPORT]; Shirley Lung, *The Problem Method: No Simple Solution*, 45 WILLAMETTE L. REV. 723, 724 (2009) (“In a case-based method, students acquire legal knowledge and skills by dissecting the arguments and reasoning in appellate case opinions and responding to questions and comments from the professor that challenge student viewpoints, highlight important points in case opinions, and identify errors made by students.”); Stephen J. Shapiro, *Teaching First-Year Civil Procedure and Other Introductory Courses by the Problem Method*, 34 CREIGHTON L. REV. 245, 246–47 (2000) (describing the step-by-step process of engaging students in case recitation under the case method); Judith Welch Wegner, *Reframing Legal Education’s “Wicked Problems,”* 61 RUTGERS L. REV. 867, 924 (2009) (noting that under the case method “[c]ases serve as touchstones for instruction . . . points of departure for pursuing a number of distinctive instructional goals including imparting knowledge about the legal process . . . and developing students’ independent capacity to engage in legal reasoning.”).

3. An array of criticism has been leveled against the case method. *See, e.g.*, Kristen Holmquist, *Challenging Carnegie*, 61 J. LEGAL EDUC. 353, 365–66 (2012) (arguing that the case method “sacrifices complexity for precision,” refining students analytical abilities while “diminish[ing] students’ ability to think about the knotty relationship among facts and culture and clients and law”); Suzanne Kurtz, Michael Wylie & Neil Gold, *Problem-Based Learning: An Alternative Approach to Legal Education*, 13 DALHOUSIE L.J. 797, 802 (1990) (arguing that the case method exposes students to distilled reconstructions of events as presented in court opinions rather than realistic fact patterns unfolding in real time); Myron Moskovitz, *Beyond the Case Method: It’s Time to Teach with Problems*, 42 J. LEGAL EDUC. 241, 245–46 (1992) (arguing that under the case method students learn by watching rather than doing and therefore fail to learn problem-solving skills); Shapiro, *supra* note 2, at 247 (noting that the case method introduces students to cases at the appellate level whereas most lawyers encounter a case at its beginning); Roy T. Stuckey, *Education for the Practice of Law: The Times They Are A-Changin’*, 75 NEB. L. REV. 648, 668 (1996) (arguing that the case method “teaches students to think like appellate

is widely viewed as a successful vehicle for teaching students how to “think like lawyers.”<sup>4</sup>

Although the case method is hands down law school’s “signature pedagogy,”<sup>5</sup> there is an alternative technique also in wide use—the problem method. Under the problem method, students still read and analyze cases, but they do so in the context of simulated client problems.<sup>6</sup> This method is perhaps best associated with code-based courses, such as those on tax law,<sup>7</sup> evidence and procedure,<sup>8</sup> legal ethics,<sup>9</sup> and the various articles of the Uniform Commercial Code.<sup>10</sup> The desire for an alternative pedagogical approach in

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judges” who make decisions based exclusively on doctrine and public policy, rather than lawyers who consider the full range of client interests); Wegner, *supra* note 2, at 927–28 (critiquing the case method for, among other things, focusing narrowly on “distilling doctrine and practicing formalistic reasoning,” “assum[ing] that there is a single answer to [key questions],” over-relying on and shifting between “paradigm” cases that “exemplify good lawyering and judicial decision-making and cases that reflect poor work by lawyers and judicial decisions that may be wrong,” and ignoring “the ‘messy’ characteristics of the context in which disputes arise”). I focus here on criticisms specific to the case method rather than those associated with Socratic style interrogation, although the two are often conflated. *See id.* at 926–29 (noting that it is unclear whether the “benefits” attributed to the case method owe to the case method itself or the Socratic-style of questioning generally associated with it and summarizing the literature valuing and critiquing the latter). Socratic style interrogation can be used in teaching a problem-based course just as it can in a case-based course. Moskowitz, *supra* at 254–55.

4. THE CARNEGIE REPORT, *supra* note 2, at 186; Larry L. Teply & Ralph U. Whitten, *Teaching Civil Procedure Using an Integrated Case-Text-and-Problem Method*, 47 ST. LOUIS U. L.J. 91, 99 (2003); Shapiro, *supra* note 2, at 247; Moskowitz, *supra* note 3, at 244.

5. THE CARNEGIE REPORT, *supra* note 2, at 23.

6. There are various definitions of the problem method. *See, e.g.*, Keith H. Hirokawa, *Critical Enculturation: Using Problems to Teach Law*, 2 DREXEL L. REV. 1, 2 (2009) (“[T]he common element among [problem-based learning (PBL) methods] involves learning by doing: PBL is a curriculum choice to place students in an active role as problem solvers.”); Lung, *supra* note 2, at 724 (“In a problem-based method, a problem rather than a case opinion constitutes the focus of discussion, and students must determine which part of their legal knowledge base is relevant and use that knowledge appropriately to solve the problem.”); Thomas D. Morgan, *Use of the Problem Method for Teaching Legal Ethics*, 39 WM. & MARY L. REV. 409, 409–10 (1998) (The problem method uses “hypothetical fact situations as the centerpiece for student analysis and discussion. . . . Students then select a course of conduct or predict a court’s decision based on a variety of legal and nonlegal materials either provided to the students or readily available to them.”). As I will describe, *infra*, the defining characteristic of the problem method is that the simulated problem frames the learning experience, serving as the launching point for discussion and the vehicle through which legal analysis occurs. *See infra* Part I.B.

7. *See, e.g.*, Scott A. Schumacher, *Learning to Write in Code the Value of Using Legal Writing Exercises to Teach Tax Law*, 4 PITT. TAX REV. 103, 103 (2007).

8. *See, e.g.*, Shapiro, *supra* note 2, at 245; Daniel B. Rodriguez, *Administrative Law and the Case Method*, 38 BRANDEIS L.J. 303 (2000); Teply & Whitten, *supra* note 4, at 100.

9. *See, e.g.*, Morgan, *supra* note 6, at 409.

10. *See, e.g.*, Kathryn R. Heidt, *Taking A New Look at Secured Transactions*, 96 COLUM. L. REV. 759, 779 (1996) (book review); Gary Monserud, *An Essay on Teaching Contracts and*

such contexts is clear. If the hallmark cognitive skill of lawyers practicing in a particular field is the rigorous reading and application of codified law, it makes little sense to use cases as the primary source materials for instructing students in that subject.

In this Article, I explore the value of the problem method from a workplace law perspective, drawing on my own adoption of the method in the basic employment law course. While employment law is not a “code” course, there are a variety of practice areas within the field that do not easily lend themselves to case-based instruction. Employment lawyers do not deal exclusively with “cases” or even disputes. They also engage in what I think of as transactional lawyering—the application of planning and compliance skills to achieve a client’s affirmative goals.<sup>11</sup> As will be described, students taught via the case method generally begin by deriving rules, then proceed to apply those rules to hypothetical fact scenarios, usually involving other disputes. The problem method turns this formula inside out—it forces students to begin with hypothetical facts, then work backwards to understand the rules and how they apply prospectively to a developing (and not necessarily adversarial) situation. Adopting the problem-method thus gives students a richer understanding of how the law operates, as well as the opportunity to cultivate problem-solving skills and professional judgment, thereby advancing the goal of graduating more “practice ready” lawyers.

This Article proceeds as follows: Part I describes how I began experimenting with and ultimately integrating problems in teaching employment law. Part II asserts that the problem method provides a means of enhancing transactional skills acquisition and deepening students’ understanding of their professional roles consistent with the Carnegie Report’s call for more integrated learning. Part III provides two examples of how I achieve these learning objectives through the use of problems in my course. Part IV offers some concluding reflections on the risks and challenges of transitioning to problem-based learning.

### I. PROBLEM METHOD VERSUS USING PROBLEMS

Interrogating the value of the problem method in the context of the workplace law curriculum begins with the preliminary question—what *is* the problem method? In this section I describe two approaches to integrating problems into the traditional classroom based on my experimentation in

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*Commercial Law for the First Time (Even If You Have Taught These Courses Many Times Before)*, 82 N.D. L. REV. 113, 144 (2006).

11. On the use of the problem method to teach transactional lawyering in the corporate deal-making context, see e.g., Karl S. Okamoto, *Teaching Transactional Lawyering*, 1 DREXEL L. REV. 69 (2009) [hereinafter Okamoto, *Transactional Lawyering*]; William J. Carney, *Teaching Problems in Corporate Law: Making it Real*, 34 GA. L. REV. 823, 828–32 (2000).

Employment Law—what I call the “additive” model of using problems and what I consider the “integrated” model of problem-based learning.

A. *The Additive Approach: Cases Then Problems*

Most law professors use problems in some form or another—for instance, as a capstone exercise upon completing a set of cases<sup>12</sup> or as a review in anticipation of the final exam.<sup>13</sup> Even the classic law school hypothetical, which poses a variation on the facts of a particular case, is in some respects a “problem.”<sup>14</sup> Such uses of problems, however, are what I consider “additive” in nature—the problem serves as a way of summarizing or elaborating on content conveyed through the analysis of other primary material, usually cases.<sup>15</sup>

For my part, I had been experimenting with the use of problems, particularly the problem-as-capstone model, for several years. The casebook I use, and which I co-authored, contains problems that lend themselves to this teaching style.<sup>16</sup> The problems appear at select places in the book—sometimes at the outset of a chapter, but more often at the conclusion of a subset of cases and notes. The professor can use the problem as a way of summing up the material, probing students’ understanding of the doctrine and its application, or prepping for a possible exam question on the subject.

12. See, e.g., Carney, *supra* note 11, at 835 (describing the use of “focused” problems where students are asked to consider single-issue fact patterns after reading a series of cases on a particular point).

13. See *id.* at 830–31 (discussing how using problems prepares students for the typical issue-spotter law school examination).

14. See Calvin William Sharpe, *Evidence Teaching Wisdom: A Survey*, 26 SEATTLE U. L. REV. 569, 578 (2003) (describing use of hypotheticals as a way of giving student opportunity to apply the law and think beyond the narrow issues of particular cases). As will be seen, however, the types of problems on which a problem-method course is based are much richer than simple hypotheticals and are used in a much different way. See Moskowitz, *supra* note 3, at 246 (distinguishing hypotheticals from problems insofar as hypotheticals generally contains few facts and issues and are posed spontaneously rather than with an opportunity for student preparation and reflection.); cf. Carney, *supra* note 11, at 830–31 (noting the significant difference between unelaborate hypotheticals “thrown at the class cold” and the kind of problems posed in law school exams).

15. See Steven Friedland, *Teaching Property Law: Some Lessons Learned*, 46 ST. LOUIS U. L.J. 581, 595 (2002) (noting that many law professors “use problems to supplement the primary learning methodology, case analysis”). I borrow the term “additive” from the Carnegie Report, which uses it to describe law school efforts to enhance professional skills and value education by producing stand-alone courses that purport to provide such instruction in isolation. See THE CARNEGIE REPORT, *supra* note 2, at 191. In contrast, the Carnegie Report proposes an “integrative” approach to such learning where the various law school “apprenticeship[s]” are engaged holistically in a single course. *Id.*

16. See TIMOTHY P. GLYNN, RACHEL S. ARNOW-RICHMAN & CHARLES A. SULLIVAN, *EMPLOYMENT LAW: PRIVATE ORDERING AND ITS LIMITATIONS* (2d ed. 2011).

I took this additive approach to integrating problems in my course for several years with some success. Ultimately, however, I became dissatisfied for two reasons. First, using problems in this way required significant additional class time. Working through a relatively involved problem can take close to a full period. Adding such exercises, without taking any material away, proved, not surprisingly, to be unsustainable.<sup>17</sup> I experimented with eliminating some of the syllabus topics in order to “make room” for the problems, but never felt I could cut enough, in good conscience, and make the course work. Of course, the time/coverage dilemma is one faculty face in all courses, but certain aspects of the basic employment law course made it particularly intractable.<sup>18</sup> In many law schools, Employment Law is an overview course that serves as an introduction for students who will likely pursue advanced offerings, as well as a stand-alone course for those who want just a taste of the field. This curricular choice poses a number of challenges, one of which is that it creates pressure to cover a broad array of topics in order to ensure that students are getting a representative sense of the practice.<sup>19</sup> This goal significantly constrained me in making substantive cuts to the course.

The second reason for my dissatisfaction was a lack of student engagement. How to make class interesting, like how to decide what to cover, is of course a primordial challenge. By second and certainly third year, students tend to be under motivated. They have become familiar with the usual routine of case recitation and analysis, which often feels far removed from the task of producing a written answer to a classic issue-spotter question, or what “really matters” for their grade.<sup>20</sup> One of my goals in introducing problems was

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17. See Carney, *supra* note 11, at 836 (noting that efforts to examine problems following traditional case teaching creates time budgeting problems that results in limiting time on problems); Edith R. Warkentine, *Kingsfield Doesn't Teach My Contracts Class: Using Contracts to Teach Contracts*, 50 J. LEGAL EDUC. 112, 116 (2000) (speculating that “many instructors, pressed for time, tend to skip the problems” that are buried “in narrative discussions that follow leading cases”).

18. See Gregory L. Ogden, *The Problem Method in Legal Education*, 34 J. LEGAL EDUC. 654, 665 (1984) (suggesting that the question of course coverage is “the same for both the problem and case methods” and requires the professor to “balanc[e] the desire for depth of comprehension against the desire for breadth of coverage”).

19. I have described this problem and the problem of how the employment law course fits within the general workplace law curriculum elsewhere, as have others. See Rachel S. Arnow-Richman, *Employment as Transaction*, 39 SETON HALL L. REV. 447, 466 (2009); Richard Michael Fischl, *Rethinking the Tripartite Division of American Work Law*, 28 BERKELEY J. EMP. & LAB. L. 163, 169–70 (2007); Orly Lobel, *The Four Pillars of Work Law*, 104 MICH. L. REV. 1539, 1549 (2006) (book review). I will return to this topic in greater detail. See *infra* Part II.A.

20. See Hirokawa, *supra* note 6, at 36 (offering problem-based learning as a means of drawing out enlivening class participation); See Shapiro, *supra* note 2, at 249 (observing that “[b]y the second and third year of law school . . . many students have become disenchanted or bored with the case method and appreciate the novelty of a new approach”).

to make class more interesting for students and more closely related to their final exam experience.<sup>21</sup> However, the problems did little to change the class dynamic. Students were not well-prepared to discuss the problems, the focus of their (all too limited) class prep time continued to be trained on the assigned cases, and the answers they offered in class tended to be superficial applications of the primary rules they had gleaned from the reading without too much consideration of the factual idiosyncrasies and complications posed by the problem.<sup>22</sup> The situation was not worse than when I taught using cases alone—although some students complained in course evaluations that we spent too much time on each topic, owing no doubt to the addition of problem-solving time on top of case analysis—but there was no measurable improvement.

*B. The Integrated Approach: Cases Through Problems*

Which brings me to what I call the “integrated” approach, or what might be thought of as the “problem first” method. Although there is no unitary definition of the term, the key characteristic of the problem method is the use of the problem as the entry point for all learning.<sup>23</sup> It is this that distinguishes the problem method from the mere use of problems as part and parcel of a more traditional case-based pedagogy as I had been doing with my class.

My experimentation with the additive approach had shown me that I needed to do two things: (1) find a way to use class time more efficiently; and (2) signal to students that they should consider problem analysis a serious component of the course. The solution was to cut the cases. Not completely, of course—students would still have to read and digest the cases to learn the law—but if I could cut some or all case exposition from our class time, I could devote more time to problem analysis without sacrificing substantive coverage.

My goal was to use the problem as a framing device for each assignment. All of the content, including the caselaw, would be unpacked, distilled, and interrogated through the problem-solving process. To make this pedagogical choice transparent to the students (and to commit to it myself), I did a simple thing: I turned my syllabus inside out. Prior to introducing problems in my

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21. The vast difference between the skills imparted by the case method and the manner in which students are tested in traditional issue-spotter exams has been frequently noted and criticized. *See* Moskowitz, *supra* note 3, at 259 (likening law school examinations to testing how a tennis student plays a match after teaching him through videotaped examples of other players); Shapiro, *supra* note 2, at 248 (observing how “[t]he divergence between how students are taught and tested has lead to . . . criticism that the case method is not only ignoring the skills that lawyers need in practice, but also the skills that students need to succeed in law school”).

22. *See* Carney, *supra* note 11, at 838 (noting the importance of how problems are presented to students in order for them to “take problems seriously”).

23. *See* Lung, *supra* note 2, at 724; Morgan, *supra* note 6, at 410–11; Moskowitz, *supra* note 3, at 250; Shapiro, *supra* note 2, at 248.



course, my Employment Law syllabus was a typical one with a series of assignments, each consisting of a doctrinal topic, followed by the assigned pages and cases. When I started including problems in my teaching, I added them at the bottom of the assigned list of readings. When I abandoned this additive approach and adopted the problem method full on, I simply flipped the order of the assigned materials for each syllabus topic. Thus, my “problem method” syllabus lists problem first and cases second, signaling to students that the problem is the principle focus of the assigned materials.

In addition to the change in my syllabus, I also told students how I expected them to prepare and how they should expect class to proceed. I explained that class discussion would begin with the problems and that they should prepare to “present” the problems the way they would recite and analyze cases in other classes. As for the cases themselves, they would be expected to draw on them in explicating their approach to the problem.<sup>24</sup>

And this is exactly what we did, often with the intended effects. Students made a greater effort to prepare the problems, and class moved more swiftly. With guidance from me, students were able to fold their knowledge of the cases into our analysis of the problem.<sup>25</sup> Yet in addition to these desired results, there was also an effect I had not anticipated. As I will discuss, this relatively minor change in the structure of the course made a significant difference in the content and depth of what we actually covered.

## II. ADDING VALUE TO AND THROUGH EMPLOYMENT LAW: THE ROLE OF PROBLEMS

### A. *The Challenges of Teaching (Employment) Law*

Before describing in greater detail how the problem method changed my course, it is important to take a step back and explain why I initially began experimenting with problems. For me, the move to problems was a way of simultaneously tackling two challenges I faced teaching employment law—one specific to the course, the other inherent in the project of educating lawyers.

The first challenge—and the one that plagues Employment Law teachers in particular—was identifying an animating theme around which to organize the substantive material. Employment Law is a platypus of a course, comprised of a hodge-podge of doctrines that do not fit neatly into the two other mainstays of the workplace law curriculum—Labor Law and Employment

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24. As I will discuss, I was not always as clear with students about this as I needed to be in first adopting the problem method, but I became increasingly explicit about my expectations as I went forward with the experiment. *See infra* Part. IV.B.

25. As with my approach to articulating expectations, over time I found I needed to be increasingly heavy-handed in directing students to the cases in the context of their analysis of the assigned problems. *See infra* Part. IV.B.

Discrimination.<sup>26</sup> The latter courses each revolve around a discrete statutory regime that presents recurring questions of doctrine and policy. Employment Law, by contrast, embraces a wide universe of rules and concepts ranging from the basic common law principles that apply equally to non-workplace relationships, to employment-specific common law doctrines, to constitutional law (in the case of public-sector employees), and an array of federal and state statutes on such disparate topics as whistleblowing to benefits protection.<sup>27</sup> Each of these sources of law presents its own set of doctrinal issues and policy questions. For this reason, teaching Employment Law sometimes feels like performing a one-man variety show with very quick costume changes.

The second challenge—and the one that law professors in all disciplines must wrestle with—is how to heed the call for more practice-oriented education. The combination of the 2007 Carnegie Report and the 2008 economic collapse have put intense pressure on law schools to revamp their curricula with an eye toward better preparing students for the profession.<sup>28</sup> According to the Carnegie Report, this requires identifying ways to integrate the so-called “apprenticeships” of practice<sup>29</sup> and professionalism<sup>30</sup> into the traditional “cognitive apprenticeship” that dominates law school education.<sup>31</sup> Law schools have excelled in providing students with substantive knowledge and training them in the art of legal thinking; in other words, they have delivered on the cognitive apprenticeship. They have not been as successful, however, in providing the practical skills training associated with the apprenticeship of practice or in inculcating in students a sense of their identity

26. Arnow-Richman, *supra* note 1919, at 466–67; Fischl, *supra* note 19, at 169–70; Lobel, *supra* note 19, at 1549–52; Steven L. Willborn, *Labor Law Without Labor*, 1988 WIS. L. REV. 547, 549 (1988) (book review).

27. Arnow-Richman, *supra* note 19, at 466; Fischl, *supra* note 19, 169–70; Lobel, *supra* note 19, at 1549–52; Willborn, *supra* note 26, at 549.

28. The news and popular media in particular have been strident in criticizing law schools on these grounds, in part due to the difficulties many law school graduates are facing securing employment. See Ethan Bronner, *Law Schools' Applications Fall as Costs Rise and Jobs are Cut*, N.Y. TIMES, Jan. 31, 2013, at A1. But see Rachel M. Zahorsky, *Now is the time to go to law school, at least in this state, dean says*, A.B.A J. (Feb. 7, 2013 10:54 AM), [http://www.abajournal.com/lawscribbler/article/now\\_is\\_the\\_time\\_to\\_go\\_to\\_law\\_school\\_at\\_least\\_in\\_this\\_state\\_dean\\_says/](http://www.abajournal.com/lawscribbler/article/now_is_the_time_to_go_to_law_school_at_least_in_this_state_dean_says/) (asserting that concerns over the slack job market for law graduates fails to account for regional differences).

29. See THE CARNEGIE REPORT, *supra* note 2, at 28 (describing law school’s “second apprenticeship,” which exposes students “to the forms of expert practice shared by competent practitioners”).

30. See *id.* (describing law school’s “apprenticeship of identity and purpose . . . [which] attempt[s] to provide a wide, ethically sensitive perspective on the technical knowledge and skill that the practice of law requires”).

31. See *id.* (describing the “intellectual or cognitive [apprenticeship, which] focuses the student on the knowledge and way of thinking of the profession”).

and obligations as professionals. Offering discrete “skills” or “ethics” courses—the typical approach to preparing students in these two areas, respectively—does not create an environment in which students can bring multiple competencies (such as specialized knowledge, applied training, and professional values) to bear in a single context.<sup>32</sup> It is this ability to integrate that is the hallmark of professional expertise.<sup>33</sup>

The problem with the integrated model of learning is that it is expensive to deliver. A sophisticated capstone or “simulation”-style course that combines all three Carnegie apprenticeships is likely to be a small class that demands significant faculty resources.<sup>34</sup> Such courses can be one component of a more comprehensive curricular reform effort, but they cannot be the sole intervention. Also needed are more modest changes to the traditional, large-enrollment law school course.<sup>35</sup> Without such efforts, Carnegie-compliant integrated learning will remain the exception—the domain of a single, seminar-sized course that is probably more integrated in its content but no less

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32. See *id.* at 58 (“[L]aw schools need to attend more intentionally to how well the various elements of legal education . . . fit together . . . . [S]imply adding more requirements . . . fails to get at this problem, because it is precisely how to integrate the acquisition of conceptual knowledge and competence with ethical intention that is in question.”).

33. See *id.* at 191 (endorsing an “integrative rather than additive strategy” for reforming legal education).

34. See Carney, *supra* note 11, at 826 (noting that “[a] single teacher can handle only a small class if students are [asked to solve problems] through drafting, fact gathering, and negotiation . . . because the courses are so time-consuming; teachers must read and critique student drafting with care to make the exercise worthwhile”); Robert C. Illig, *The Oregon Method: An Alternative Model for Teaching Transactional Law*, 59 J. LEG. EDUC. 221, 231 (2009) (noting the demands imposed on faculty time by experiential skills courses including the need to develop connections in the legal community, to review and provide feedback on student work, to undertake significant preparation and planning, and stay current with day-to-day practice developments); Kurtz, *supra* note 3, at 815 (conceding that “[l]arge classes represent a challenge” for faculty wishing to implement student-centered problem-based learning and recommending a class size not exceeding ten to twelve students); Louis N. Schulze Jr., *Alternative Justifications for Academic Support II: How “Academic Support Across the Curriculum” Helps Meet the Goals of the Carnegie Report and Best Practices*, 40 CAP. U. L. REV. 1, 4 (2012) (noting that Carnegie-style reforms are “a drain on professorial human capital, and this drain in turn requires additional, costly hiring”).

35. See Illig, *supra* note 34, at 232 (describing need for a “course structure that can provide an integrated transactional [skills] experience without exhausting a law school’s resources or unduly sapping its faculty’s time”); Hirokawa, *supra* note 6, at 38 (“[A]ssuming that legal reform will not seriously occasion the withdrawal of doctrinal courses from the curriculum, we should now be discussing the host of legitimate fears and risks of reforming legal education in the doctrinal classroom.”); Holmquist, *supra* note 3, at 377–78 (proposing small-scale changes to traditional classes—such as the integration of a case file or incorporation of more applied questioning—in order to provide students with deeper and more representative cognitive lawyering skills).

isolated from the mainstream curriculum than the “skills” and “ethics” classes we have now.<sup>36</sup>

### B. *The Problem as the Solution*

For me, the use of problems was a way of addressing both of these challenges. For some time I had been filling the thematic gap in my course by emphasizing lawyering skills. In the time that one might have spent discussing the connections between different assignments or policy in broad strokes, I looked for opportunities to probe students’ understanding of the lawyer’s role as counselor. I focused in particular on the skill of advising clients how to manage employment relationships and act strategically given the state of the law or in the face of legal uncertainty.<sup>37</sup> Thus, I would ask students at the end of a case discussion questions like: “What would you tell this employee to do differently if she had come to you about her problems at work before she got fired?” or “What mistakes did this employer make in handling this worker’s complaint that, if corrected, might have avoided liability?”

This was an organic process for me: I asked students the questions that interested me. I came to teaching from a management-side employment practice where the aspect of my job I most enjoyed was helping clients navigate and comply with the law.<sup>38</sup> As an academic, in addition to my focus on employment law, I teach and write in the area of contracts. In that field of practice, the critical lawyering skills are the ability to design and execute transactions. Putting these two interests together, I found myself focusing in

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36. It should be noted that workplace law faculty have long been experimenting with these more ambitious types of curricular reform. *See, e.g.,* Roberto L. Corrada, *A Simulation of Union Organizing in a Labor Law Class*, 46 J. LEGAL EDUC. 445, 445–46 (1996) (adopting a simulation-based pedagogy in the traditional labor law course); Rafael Gely, Assoc. Dean for Academic Affairs and James E. Campbell Mo. Endowed Professor of Law, Univ. of Mo. Sch. of Law, William C. Wefel Center for Employment Law & ST. LOUIS U. L.J., Teaching Employment and Labor Law Panel: Learning Outcomes in the Workplace Law Curriculum (Feb. 15, 2013), available at <http://slu.edu/school-of-law-home/news-and-events/events/past-events/teaching-employment-and-labor-law/videos>; Laura J. Cooper, *An Experiment In Legal Education: Simulating ADR Processes in the Capstone Course on Labor and Employment Law*, 66 DISP. RESOL. J. Feb.-Apr. 2011, at 50, 52 (developing an integrated “[c]apstone” course that embraces skills, ethics, and diverse areas of substantive law).

37. *See* Eleanor W. Myers, *Teaching Good and Teaching Well: Integrating Values with Theory and Practice*, 47 J. LEGAL EDUC. 401, 419 (1997) (noting that a “transactional approach is particularly well suited to exposing the dynamic nature of legal problems and the difficulties of planning in the face of uncertainties”); Okamoto, *Teaching Transactional Lawyering*, *supra* note 11, at 83 (asserting that “[t]he essence of lawyering is ‘creative problem solving’ under conditions of uncertainty and complexity”).

38. *See* Nicole B. Porter, *Assessing the Workplace Law Curriculum from a Corporate Compliance Perspective*, 58 ST. LOUIS U. L.J. 155, 155 (2013) (describing the “conscientious compliance” perspective of management-side practice).

class on the role of the employment lawyer as the maker, manager, and troubleshooter of workplace relationships—what I have come to think of as “transactional employment lawyering.”

The subject of transactional lawyering is a broad one that I have explored elsewhere at length,<sup>39</sup> but two aspects bear mentioning here. The first is the relative absence of transactional skills training in the general law school curriculum—what I call the “transactional thinking gap.”<sup>40</sup> It is one thing to talk about an “apprenticeship of practice,” quite another to identify the substance of what is taught. In both their traditional and “skills” courses, law schools primarily focus on the lawyer’s role as advocate. Doctrinal courses inculcate students in the art of case explication and legal reasoning—cognitive skills that translate principally into preparing briefs, demand letters, position statements, and oral arguments.<sup>41</sup> The most commonly offered skills courses—clinics, Trial Advocacy courses, Moot Court—provide opportunities to apply that training.<sup>42</sup> In contrast, law schools have historically done little to prepare students for their role as counselor and advisor, either through skills courses or in the traditional doctrinal curriculum.<sup>43</sup> Faculty routinely ask students how the rule in a particular case would apply to another hypothetical dispute; only rarely do they ask how the relationship in that case could have been managed differently to avoid a dispute altogether.<sup>44</sup> A focus on this type of thinking—

39. Arnow-Richman, *supra* note 19, at 456–60.

40. *Id.* at 460; *see also* Illig, *supra* note 34, at 226 (“[T]he legal academy has yet to identify a satisfactory means for addressing the basic gap in our students’ understanding of dealmaking.”); Karl S. Okamoto, *Learning and Learning-to-Learn by Doing: Simulating Corporate Practice in Law School*, 45 J. LEGAL EDUC. 498, 498 (1995) [hereinafter Okamoto, *Learning by Doing*] (bemoaning “the almost complete absence of ‘lawyering’ courses focusing on the work of transactional attorneys”); Tina L. Stark, *Thinking Like a Deal Lawyer*, 54 J. LEGAL EDUC. 223, 223 (2004) (“Although the academy prides itself on teaching students to think like a lawyer, for the most part we teach students to think like litigators.”).

41. *See* Arnow-Richman, *supra* note 19, at 456; Stark, *supra* note 40, at 223–24.

42. Arnow-Richman, *supra* note 19, at 457–58; Edward A. Dauer, *Reflections on Therapeutic Jurisprudence, Creative Problem Solving, and Clinical Education in the Transactional Curriculum*, 17 ST. THOMAS L. REV. 483, 485 (2005).

43. *See* Myers, *supra* note 37, at 405 (suggesting the use of transaction-based simulations to “counterbalance . . . an overemphasis on litigation in most law school materials”). A growing number of schools now have transactional skills classes and clinics, though they are still vastly outnumbered by opportunities for litigation skills acquisition. *See, e.g.*, Victor Fleischer, *Deals: Bringing Corporate Transactions into the Law School Classroom*, 2002 COLUM. BUS. L. REV. 475, 490–92 (2002) (describing the Columbia Law “deals class”); Illig, *supra* note 34, at 234–36 (describing the Transactional Practice Labs at Oregon Law); Myers, *supra* note 37, at 406–11 (describing Temple’s integrated transactional program); Okamoto, *Transactional Lawyering*, *supra* note 11, at 73–108 (describing the Law & Finance of Transactional Lawyering course at Drexel).

44. *See* Carney, *supra* note 11, at 824 (describing the appellate cases students read as “failures[s] of private ordering” and noting the failure to focus on the lawyer’s role in engineering

how lawyers consider law in seeking to achieve client goals and reduce risk—can fill a gap not only in the workplace law curriculum, but also in students’ legal education more broadly.<sup>45</sup>

The second aspect of transactional lawyering that is important at this juncture is the connection between transactional skills and larger themes of law and policy within workplace law. A recurring question in the practice and study of this field is the way in which private ordering both responds to and shapes legal rules. Of late, employment law has retrenched in favor of increased deference to the private “choices” of the affected parties, a trend I have described elsewhere, as have others.<sup>46</sup> As an example, courts in a variety of doctrinal contexts—from inquiring into the enforceability of employee handbooks to assigning vicarious liability for sexual harassment, appear willing to accede to employer-drafted contracts and policies in assessing workers’ claims.<sup>47</sup> This means that the *ex ante* choices made by employment lawyers (principally, though not exclusively, on the management side) can have a critical impact on the shape and scope of workplace protection. Training students transactionally not only cultivates an important practical skill set, it creates a context for assessing these doctrinal trends and interrogating the role and professional responsibility of lawyers operating under those rules.

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successful relationships); Myers, *supra* note 37, at 421 (noting that traditional teaching “tends to deemphasize the lawyer’s role, because it focuses primarily on the role of judge or arbiter”).

45. On the relative absence of transactionally focused workplace law courses, see Porter, *supra* note 38, at 159–162 (describing the results of a survey of workplace law course offerings based on posted course catalogues and course schedules of law schools nationally).

46. Arnow-Richman, *supra* note 19, at 467–74; Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 322 (2005); Lauren B. Edelman & Mark C. Suchman, *When the “Haves” Hold Court: Speculations on the Organizational Internalization of Law*, 33 LAW & SOC’Y REV. 941, 976 (1999); Roberto L. Corrada, *Claiming Private Law for the Left: Exploring Gilmer’s Impact and Legacy*, 73 DENV. U. L. REV. 1051, 1055 (1996).

47. See Arnow-Richman, *supra* note 19, at 467–74. There is a large amount literature on the subject of judicial deference to employer anti-discrimination and harassment policies. See Sandra F. Sperino, *A Modern Theory of Direct Corporate Liability for Title VII*, 61 ALA. L. REV. 773, 779–81 (2010); Scott A. Moss, *Reluctant Judicial Factfinding: When Minimalism and Judicial Modesty Go Too Far*, 32 SEATTLE U. L. REV. 549, 552–54 (2009); Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 25–26 (2006); Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2122 (2003); David Sherwyn et al., *Don’t Train Your Employees and Cancel Your “1-800” Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 FORDHAM L. REV. 1265, 1283 (2001). On the subject of deference to employer-drafted disclaimers, see Rachel Arnow-Richman, *Just Notice: Re-Reforming Employment at Will*, 58 UCLA L. REV. 1, 34 (2010); Jonathan Fineman, *The Inevitable Demise of the Implied Employment Contract*, 29 BERKELEY J. EMP. & LAB. L. 345, 375–77 (2008); Stephen F. Befort, *Employee Handbooks and the Legal Effect of Disclaimers*, 13 INDUS. REL. L.J. 326, 351–67 (1992).

Returning to the use of problems, the problem method offers a natural vehicle for this type of learning. Certainly transactional lawyering can be taught using the case method; the facts of a case are a type of problem.<sup>48</sup> But they are a problem in which the key events have occurred, the relevant facts have been identified, and the legal implications have been determined.<sup>49</sup> By developing hypothetical problems divorced from particular cases and results, the professor can present the client's situation at an earlier point in time, a time that not only precedes litigation, but which also precedes any dispute.<sup>50</sup> The student is thus placed in the role of problem avoider rather than problem solver. The task is to achieve the client's affirmative goals—including business or personal goals, depending on whom one represents, while reducing either the risk of liability or personal and financial loss.

### III. PROBLEMS AS PRACTICE CONTEXTS: BECOMING A TRANSACTIONAL EMPLOYMENT LAWYER

I turn now to the mechanics of the problem method. In this section I offer two examples of how I teach transactional employment lawyering through problems in the basic course. The first illustrates the lawyer's role in developing and disseminating workplace policies; the second illustrates the lawyer's role in regulatory compliance.

Both of the examples I have selected involve practice contexts frequently faced by management-side lawyers. Over the course of the semester, my

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48. See Myers, *supra* note 37, at 406 (noting that “[o]ne can teach cases with a transactional perspective by focusing on the underlying story of the parties, their lawyers, their decisions and choices”).

49. See Holmquist, *supra* note 3, at 373 (urging that students receive “more experience with . . . legal problems from the ground up. So much has happened in a case—lawyers and clients and judges have already made so many decisions—before it ever reaches the phase of an appellate opinion”); Myers, *supra* note 37, at 421 (noting that “[a] traditional law course, which emphasizes finding and applying the law by reading cases . . . conveys a sense that law is more or less fixed and determinate, existing independently from people and emotions”); Steve Sheppard, *Casebooks, Commentaries, and Curmudgeons: An Introductory History of Law in the Lecture Hall*, 82 IOWA L. REV. 547, 620 (1997) (describing the case method as a “quiz session” where a student “demonstrat[es] that he knows and understands the solutions that have been produced by other people: judges, legislators, and professionals; restators of law”).

50. See Carney, *supra* note 11, at 824 (noting that the appellate case context “casts litigators and courts as the rescuers of innocent victims who are unable to protect themselves *ex ante*. The reality is otherwise. Millions of relationships are created and millions of agreements are written that are peacefully performed. Lawyers . . . assure these successes”); Myers, *supra* note 37, at 421 (noting that transactional context “conveys to students that law practice . . . consists of planning for people, counseling them about options, negotiating outcomes, and drafting results. . . . Lawyers advising clients in transactions may help them act cooperatively to preserve relationships, sometimes trading the achievement of immediate goals for longer-term opportunities”); Warkentine, *supra* note 17, at 123 (arguing that a document-based approach to teaching Contracts emphasizes skills of “planning, prediction, and dispute avoidance”).

students receive consistent exposure to both sides of the field; the problems I use are roughly equally divided between those raising management-side scenarios and those involving employee representation. For the purpose of this Article, I have chosen to focus on management-oriented problems for two reasons. First, transactional skills are especially important to lawyers representing organizations. As a practical matter, these lawyers are more likely than employee-side attorneys to be called upon to draft documents (such as contracts and policies) and to be consulted by a client in advance of a dispute. Second, management-side training arguably suffers more than employee-side training when employment law is taught strictly through the case method. Students taught through the case method become adept at making legal arguments, a universally valuable skill; but they receive almost no instruction in achieving legal compliance, a task that arguably comprises the bulk of a management lawyer's work.<sup>51</sup> In this way, problem-based instruction does not so much advance a particular ideological view as ensure that the curriculum is properly balanced.<sup>52</sup>

As the selected examples illustrate, my adoption of the problem method changed both the content and form of class discussion from what I had previously experienced using a more traditional pedagogy. Over the years, I have found that teaching via the case method results in a fairly predictable progression for class discussion: We begin with the recital of case facts, which leads to articulation of a rule, followed by exploration of doctrinal nuances, sometimes through the use of hypotheticals. From there we might consider possible policy implications, mostly in the abstract (*e.g.*, is the rule espoused in the case good or bad, who does it help or hurt, how will it be administered?). Finally, and subject to time constraints, we might end discussion by speculating about how lawyers might respond to the rule in seeking to effectuate their clients' interests.

The problem method casts this formula by the wayside. Rather than begin at the beginning (with case analysis), we begin at the end (with the practical implications of the rules), back our way into doctrine and case exposition, and intersperse a heavy dose of policy and professionalism throughout. In short,

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51. See Porter, *supra* note 38, at 171–175 (describing the broad range of compliance-oriented tasks performed by management lawyers).

52. It should also be noted that there are many law school courses in which students focus on representing only one type of client (usually plaintiffs) and that many professors teach from what is at least perceived to be a progressive bent. See *id.* at 176. That said, situating students in management-side practice contexts does not preclude complementary consideration of employee-side lawyering skills. As my previous examples demonstrated, it is sometimes possible to flip a problem to place the student in the shoes of opposing counsel and it is always useful to interrogate students' analysis on the defense side from a plaintiff's perspective. See *supra* Parts II.A–B.



having turned my syllabus “inside out,” I discovered that class discussion had turned inside out as well.

A. *Workplace Policies and Procedure*

A recurring practice context for management-side attorneys is the development and revision of workplace policies and procedures. This type of work might flow from an actual dispute that flags the need to create a particular personnel policy or leads management to reevaluate existing ones. Alternatively it may come about as part of a compliance audit or on the occasion of some change in the law—the passage of new legislation or an adverse ruling in a case against the client.

Working with policies can involve a range of different legal issues, some of which are contested. A common one that transcends this aspect of the practice is the degree to which employers may modify documents that have already created binding obligations. A split of authority exists between those jurisdictions that allow employers to modify manuals unilaterally (the emerging majority rule) and those that require more formal modification (increasingly the minority rule), with many jurisdictions yet to weigh in.<sup>53</sup> This means that a management-side lawyer tasked with effecting a change in a client’s written policies has to be able to advise the client and execute the modification in a climate of legal uncertainty.

How do we teach students this law and the relevant lawyering skills? Using the case method, my class would generally proceed something like this: The students would come to class having read cases that adopted competing rules. We would walk through these decisions, laying out the courts’ analyses and interrogating the legitimacy of each approach. During this exercise, we would spend a good bit of time talking about the mechanics of contract modification—whether the employment relationship is unilateral or bilateral, whether consideration is in fact a modification requirement, whether continued employment constitutes consideration. At some point, we would discuss policy—whether it is “fair” to the employee to give management the ability to change its policies unilaterally, whether management needs that flexibility to run its business, whether requiring a more formal modification process is administratively burdensome, and, if it is, whether it is a necessary tradeoff to protect workers. Finally, we would arrive at the question of what a management attorney should actually do when modifying a manual in a formal

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53. Compare *Asmus v. Pac. Bell*, 999 P.2d 71, 78 (Cal. 2000), and *Ryan v. Dan’s Food Stores, Inc.*, 972 P.2d 395, 401 (Utah 1998), with *Demasse v. ITT Corp.*, 984 P.2d 1138, 1153 (Ariz. 1999), and *Torosyan v. Boehringer Ingelheim Pharm., Inc.*, 662 A.2d 89, 99 (Conn. 1995). See also *Arnow-Richman*, *supra* note 19, at 485–87; *Befort*, *supra* note 47, at 357–61; W. David Slawson, *Unilateral Contracts of Employment: Does Contract Law Conflict with Public Policy?*, 10 TEX. WESLEYAN L. REV. 9, 11 (2003).

modification state. At this point, however, there was often little time for discussion and only rarely did I find students thoughtful about what type of consideration they would provide or how they would secure worker assent to the modification.

After I introduced the problem method, however, class discussion unfolded differently. At the outset of the materials on the enforceability of handbooks, I give students the following problem:

Imagine that following *Woolley v. Hoffmann-La Roche, Inc.*, the Human Resources director at Hoffmann-La Roche contacts you about revising the company's personnel manual. The HR director feels that the manual is good for employee morale and would like to continue using it, but hopes to alter the language so as to protect the company from future contractual liability. Look at footnote 2 of *Woolley*, which contains the key language that gave rise to Woolley's claim. How would you redraft this? What might you add? Will the revision you create satisfy the company's goals?<sup>54</sup>

The reference is to *Woolley v. Hoffmann-La Roche, Inc.*, the key case appearing in many employment law textbooks, which holds that language in a handbook can create an implied-in-fact contract for job security.<sup>55</sup> Unlike the other problems that are assigned primarily for class discussion, I assign this problem as an out-of-class drafting exercise. Students are placed in groups and tasked with revising the handbook language excerpted in *Woolley*, as well as preparing a cover memo explaining the changes to the client.

I have described this out-of-class exercise and its value in teaching transactional employment lawyering in detail elsewhere.<sup>56</sup> My purpose here is to elucidate how structuring class around the problem affects the scope and depth of our in-class discussion of the modification materials. At the point that we engage those readings, the students have already been assigned (and in some cases have begun) the drafting exercise, so they know that understanding the cases that they are reading is critical to their success on a graded assignment. I, therefore, begin by asking the students a question related to that assignment: How will they recommend that the client go about disseminating the new manual once they have revised it?

What flows from this question is a practical lesson in how to give proactive legal advice, not only in the face of uncertain law but also uncertain facts.<sup>57</sup>

54. See GLYNN ET AL., *supra* note 16, at 116.

55. *Woolley v. Hoffmann-La Roche*, 491 A.2d 1257, 1264 (N.J. 1985).

56. See Arnow-Richman, *supra* note 19, at 487–501.

57. See Carney, *supra* note 11, at 829 (observing that “[a] tolerance for a considerable amount of [legal] uncertainty is the first step” toward gaining the wisdom students need for transactional practice); Illig, *supra* note 34, at 222 (“Ultimately, the challenge facing a business lawyer is how to manage and allocate risk in the face of uncertainty.”); Myers, *supra* note 37, at 419, 421 (noting that “transactional approach is particularly well suited to exposing the dynamic nature of legal problems and the difficulties of planning in the face of uncertainties. . . . Lawyers

The students' initial response is that they will research the law where the client is located and determine which modification rule governs in that jurisdiction. Fair enough. But what if the client operates in multiple jurisdictions? Or what if it operates in one jurisdiction now, but hopes to expand elsewhere in the future? What if the law is unclear in the client's jurisdiction—maybe there is no case on point, or there is only a lower court case? After a bit of interrogation, students grasp that, from a risk management perspective, the best advice is for the client to satisfy the requirements of the more stringent formal modification rule—what I call the highest common denominator approach to advising clients—even if they have reason to believe that the client could lawfully modify unilaterally.

This notion that clients are often best served by over-compliance is a critical concept for transactional lawyers and one that students have rarely encountered. All they have seen in reported cases are employers (and defendants generally) arguing for the rule that most favors their position, and in class they spend most of their time making arguments along these same lines. Certainly, if an employer is sued by an employee based on promises in a prior manual, it will defend by arguing first and foremost that it is entitled to modify its policies unilaterally, at any time, and without notice. But if the court disagrees and concludes that assent and consideration are required, the employer must be prepared to argue in the alternative that its dissemination of the modified manual satisfied those requirements. In fact, complying with this higher standard on the front end may prevent subsequent litigation over the legitimacy of the modification in the first place.

Now that students understand the stakes of compliance, they are primed to figure out exactly what to do. What follows is an extremely detailed and practical conversation about how to achieve a formal modification that in turn leads to a deeper understanding of the rationale for the rule and the role of the lawyer in complying with it. The starting point is what should the client offer as new consideration to support the modification? A bonus? A raise? How much should it be? One hundred dollars? Ten? A dollar? Students are quick to point out that contract law is indifferent to the value of consideration—the employer could provide as little as the proverbial peppercorn—but, at the same time, some students are uncomfortable recommending only a token consideration. Why?

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in the midst of transactions have to make judgments with incomplete information, and in changing situations"); Okamoto, *Transactional Lawyering*, *supra* note 11, at 122 (noting that unlike "those involved in law as litigators or judges . . . [who seek] to reach a determination of a legally-determined outcome based on a state of facts that has occurred . . . [, the] business lawyer . . . is asked to attempt to allocate rights . . . in a world where the facts remain to be determined").

One concern is simple fairness to the workers. Is this a legitimate consideration for a management attorney? Certainly, the lawyer's duty is to its client, not the client's workforce. But are there reasons why treating employees fairly is in management's interest? Yes. In fact, another reason some students resist the token consideration approach is appearances. The employer will look ungenerous, which could have morale implications or even encourage lawsuits. In this way, students realize that the lawyer's role goes beyond bare-bones compliance with the law; he or she must achieve the best result for the client in the long run, taking account of its business interests (as well as its legal ones) and the possibility of downstream risk. Finally, there is also risk in hewing too closely to the letter of the law. Courts espousing the formal modification approach have merely held that employers must provide new consideration; we can only surmise from the limited case law exactly what satisfies this requirement. Irrespective of what contract doctrine says about the sufficiency of consideration, might a court, faced with an employer who gave negligible consideration in exchange for a significant retraction of workplace rights, be persuaded to hold that some further consideration was required? The lawyer must insulate its client against this possibility as well.

Whatever conclusions they may reach on these questions, students see clearly the limits of the new consideration rule as a means of protecting workers. If contract law allows employers to provide as much or as little as they wish, what is most important about the formal modification rule is not the new consideration requirement but the need for employee assent. How should the client comply with that element of the rule? Since they are already thinking about their written assignment, students are quick to identify a panoply of options, ranging from a simple signature of receipt to holding one-on-one meetings in which the handbook revisions are explained to the worker who must initial each one. The latter option is fodder for both debate and introspection. Is it realistic to expect a large company to conduct such an exercise with each and every employee? And what will happen if the employee, when given the option, agrees to some of the changes but not others? What challenges would piecemeal assent pose for the employer? Suddenly judicial concerns about the administrative burdens of a formal modification rule have real meaning to the students.

At the same time, they realize that it is only by taking the rule to that extreme that anything like real assent is achieved, and, more troubling, that such transparency may be undesirable to their client. "If the employer *could* take the time to read through each change with each employee, would it want to?" I ask. "And if not, what does that tell you?" Students are troubled by this, and that is the point. Should they recommend that the client achieve technical compliance with the assent requirement, while knowing that the changes, if made more transparent, would be objectionable to employees? Maybe it does not matter, some might rationalize; since the employee can be terminated at

any time, explaining the changes is a mere formality. Here, they must be reminded of the legal context: the premise of the modification inquiry is that workers have already received some guaranteed protection through the prior manual; the employer may not be able to terminate freely. More importantly, there is a practical reality: even if the employer can terminate, it does not necessarily want to do so, nor are its managerial interests well served by achieving assent through threat of termination.

In the end, we are left with the question that pervades all of transactional lawyering: Is there an ethically satisfying and administratively feasible way to proceed that abides by the rule of law and serves the client's interests? Of course, there are many possible answers. One might recast the client's interests altogether: if the changes are so adverse that they are likely to seriously impair morale, perhaps management should reconsider whether to impose them. Or one might consider ways to mitigate the negative effects: for instance, through over-compliance. Providing meaningful consideration, as opposed to a peppercorn, might go a long way toward making the changes palatable to workers. Whatever conclusion they arrive at, students come away with a more sophisticated and more contextual understanding not just of the rule, but also of its underlying rationale, its practical effect, and their role as lawyers.

#### *B. Regulatory Compliance*

Another skill critical to management-side employment law practice is the ability to operate proactively in a regulatory environment. Particularly in large organizations, personnel decisions are frequently made in consultation with counsel in consideration of possible statutory obligations in order to avoid the risk of possible litigation. In such situations, the question of legal rights and duties is presented in the context of a human resources problem.

Issues related to the Family Medical Leave Act (FMLA) frequently arise in this way, although that is not how cases present them.<sup>58</sup> FMLA cases typically involve a terminated plaintiff asserting that the employer's failure to reinstate him or her following leave (or a subsequent termination following reinstatement) was based on the employee's exercise of FMLA rights.<sup>59</sup> My experience teaching such cases is that they tend to steer class discussion toward technical and strategic litigation issues such as proof of motive and the distinction between FMLA interference and retaliation claims. Alternatively, some casebooks present the FMLA through *Nevada Department of Human Resources v. Hibbs*, the Supreme Court case upholding the FMLA against a sovereign immunity challenge.<sup>60</sup> Using that case often focuses class discussion on the statute's policy goals, such as whether and to what extent the law is

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58. 29 U.S.C. §§ 2601–2654 (2006).

59. See GLYNN ET AL., *supra* note 16, at 745–50.

60. *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 727, 735 (2003).

intended to help women and the implications of doing so through a gender-neutral mandate.

What is more difficult to accomplish with cases is to give students a sense of how lawyers vet threshold issues of eligibility, coverage, and scope in advising employers dealing with an incumbent employee who is experiencing attendance problems. Such issues may be litigated in a particular case and some casebooks include such cases for student reading.<sup>61</sup> But discussing these cases using the traditional case methodology does little to model for students how lawyers advise employers in dynamic situations. The relevant portions of the statute and regulations have been identified for them in the written decision and the employer's personnel decisions have already been made.

A problem can fill this gap. I use one based on *Troupe v. May Department Stores Co.*, a well-known pregnancy discrimination case arising under Title VII.<sup>62</sup> The students have already read this case in their materials on the Pregnancy Discrimination Act (PDA)<sup>63</sup> and therefore are familiar with the facts. The plaintiff was a sales clerk who experienced severe nausea and related symptoms during her pregnancy, resulting in significant attendance problems.<sup>64</sup> She was terminated on these grounds one day prior to the anticipated start of her maternity leave.<sup>65</sup> The United States Court of Appeals for the Seventh Circuit, in an opinion by Judge Posner, upheld summary judgment for the defendant. In so doing, it assumed that the employer would have been equally intolerant of comparable absences and tardiness by a non-pregnant worker.<sup>66</sup> "Employers," Posner famously quipped, "can treat pregnant women as badly as they treat . . . nonpregnant employees."<sup>67</sup>

When we move from our PDA assignment to the FMLA materials, I give students the following problem:

Suppose that the facts recounted in *Troupe v. May Department Stores* were to occur after the effective date of the Family Medical Leave Act. How would this affect Troupe's situation and her employer's obligations? If you were counsel to May Department Stores, how would you recommend it respond to Troupe's tardiness and pregnancy-related illness? To her need for leave? What obligations does Troupe have to your client prior to, during, and after any leave it provides her?

61. See STEVEN L. WILLBORN ET AL., EMPLOYMENT LAW: CASES AND MATERIALS, 698–704 (5th ed. 2012) (containing a particularly good example of this type of decision).

62. *Troupe v. May Dep't Stores, Co.*, 20 F.3d 734, 735 (7th Cir. 1994).

63. 42 U.S.C. § 2000e(k) (2006).

64. *Troupe*, 20 F.3d at 735.

65. *Id.* at 735–36.

66. *Id.* at 738.

67. *Id.*

The setup of the problem pushes students immediately to consider eligibility and compliance issues. The employer must determine whether Troupe is a covered employee, whether she has experienced a qualifying event (and which one), and the amount and form of leave she may take. Students quickly note that, assuming Troupe meets the threshold hours requirement, she will experience a qualifying event under subsection (A), and will be entitled to take up to twelve weeks of job-protected leave for the birth of her child.<sup>68</sup> The more difficult question, and the one that is more pressing for the client, is whether the employer has obligations to Troupe *prior to* the birth of her child during the time when her attendance is affected by pregnancy-related illness. This brings the students' attention to subsection (D), which grants the employee leave for his or her own serious health condition.<sup>69</sup>

The shift in focus from subsection (A), childbirth, to subsection (D), employee health, is a critical one. Without the context supplied by the problem, students tend to think of the FMLA as bifurcated into leave for childbirth and leave for health reasons. This exercise demonstrates the interrelation of the two, and more importantly, how the doctrinal inquiry differs under each. To be eligible for leave under subsection (D), Troupe's pregnancy-related illness must qualify as a "serious health condition."<sup>70</sup> Identifying this issue launches a regulatory research exercise that begins with students examining the statutory definition of serious health condition,<sup>71</sup> leads them to the more detailed regulatory definition of the same term,<sup>72</sup> and in turn to the sub-definition of "continuing treatment."<sup>73</sup> At that point, students spend a good bit of time puzzling over whether pregnancy related illness fits within the lengthy explanation of "incapacity and treatment" under section 825.115(a) before I encourage them to read down a bit further to subsection (b), which includes as continuing treatment "[a]ny period of incapacity due to pregnancy."<sup>74</sup>

The inquiry does not end there, however. Now that Troupe's illness is covered, what does she get? The FMLA entitles Troupe to up to twelve weeks unpaid leave for her pregnancy-related incapacity, but what about her intermittent absences and chronic tardiness? This brings us to a discussion of the FMLA's intermittent leave rule, and a more nuanced understanding of how lawyers advise clients on compliance matters. If the employee's FMLA eligibility is due to a serious health condition, the leave "may be taken

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68. See 29 U.S.C. § 2612(a)(1)(A) (2006).

69. See *id.* § 2612(a)(1)(D).

70. *Id.*

71. *Id.* § 2611(11).

72. 29 C.F.R. § 825.113 (2012).

73. *Id.* § 825.115(a).

74. *Id.* § 825.115(b).

intermittently or on a reduced leave schedule when medically necessary.”<sup>75</sup> In other words, the employer must tolerate her attendance problems if they are due to a qualifying event. Can the employer require anything of her? What about notice? Indeed, the statute provides that an employee must provide thirty days advance notice, but only when the need for leave is foreseeable; when it is unforeseeable only such notice as is practical.<sup>76</sup>

At this point it can be useful to put the students in the shoes of an attorney faced with an unhappy client. “Do you mean to tell me,” I might say to the student who has just successfully worked his or her way through the intermittent leave and notice rules, “she can be late or absent whenever she wants and I won’t even know about it until her shift starts?” We are now ready to have a practical discussion about the client’s non-legal interests and the lawyer’s counseling role in a realistic context that requires the type of proactive thinking and problem-solving associated with transactional practice. How can the lawyer come up with a solution to the client’s legitimate business concerns while keeping the client in compliance with the law? A potential answer lies in the *Troupe* case itself. At one point during Troupe’s illness the employer opted to switch her schedule to accommodate the fact that her symptoms were at their worst in the morning.<sup>77</sup> When I teach the case through the lens of the PDA, I ask students whether the employer was required to make this switch. The answer of course is no. But now students can see why the employer might find it in its interest to provide a non-mandatory accommodation. It is a good lesson both in how a client’s non-legal interests may affect their preferences and how the lawyer can add value.<sup>78</sup> Good transactional lawyering means showing a client not just what the law obligates or prohibits it from doing, but also how the client can work within the law to advance its business interests while minimizing loss.

The same goes for understanding Troupe’s interests. I ask the students to consider how Troupe might feel about the switch in schedule, particularly since it appears to have been imposed by the employer rather than at her request. We have already determined that Troupe is entitled to use her leave time intermittently whenever her symptoms present. Yet why might she prefer a change in schedule? First, it maintains her salary. Here is an opportunity to remind students in context that FMLA leave is unpaid. Second, it preserves her leave. I may have to lead students to this realization by asking directly: “Is

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75. 29 U.S.C. § 2612(b)(1) (2006).

76. *Id.* § 2612(e)(2)(B).

77. *See Troupe v. May Dep’t Stores Co.*, 20 F.3d 734, 735 (7th Cir. 1994).

78. *See Okamoto, Learning by Doing*, *supra* note 40, at 500 (The traditional notion of legal expertise . . . assumes that the problem posed is answerable by reference to substantive law . . . . Rarely is this the case. To solve real-world legal problems one must go beyond the legal rules and take into account situational dynamics.”).



there any reason why Troupe might not want to use FMLA leave for her illness even if she is entitled to it?" It is sometimes only at this point in the analysis that students realize that, with the exception of leave related to military service, the various triggering events under the FMLA draw from the same twelve-week allotment.<sup>79</sup> "Wait," a student will say, "if she uses all her time now does that mean she won't have it when she gives birth?" Exactly. The more FMLA leave Troupe uses for her pregnancy-related illness, the less she will have with her child.

As this last point illustrates, the analysis of the problem not only cultivates applied critical thinking skills, it offers opportunities for rich, contextualized discussions of policy. At every point, students see how particular regulatory choices affect those protected by and obligated under the law.<sup>80</sup> It is one thing to talk about the administrative burdens the FMLA imposes on employers, but it is another to put students in the position of having to respond to a client struggling to manage its workplace while contending with repeated unpredictable absences. Similarly, one can talk in the abstract about the limitations of the FMLA in helping women balance work and family, but the conversation is much deeper when students have had the benefit of having thought through Troupe's situation.<sup>81</sup> The tradeoff she faces in using leave for pregnancy versus childbirth offers a concrete example of how the regulatory choice to link family and medical issues in a gender-neutral statute plays out in real life.

In sum, using the problem method enriches the learning experience in several ways. It enhances the pedagogy of practice by replicating the process by which lawyers research and analyze doctrine in a dynamic environment. It cultivates transactional thinking skills, placing students in the role of counselor and asking them to advise clients proactively in consideration of their various interests. It also layers context onto discussions of policy and the role of the lawyer, enabling students to engage these complex questions in a more meaningful and nuanced way.

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79. Within a single 12-month period, employees are entitled to 26 weeks of military leave, or a combined total of 26 weeks leave that includes up to 12 weeks of other FMLA-qualifying leave. 29 U.S.C. § 2612(a)(4) (2006 & Supp. 2012).

80. As Keith Hirokawa has observed, "[T]eaching through problem solving is constructed upon the student discovery of the values that are lost or gained in the application of legal rules, of the perspectives that shaped law (or were excluded from law), and of the consequences of legal protection." Hirokawa, *supra* note 6, at 10.

81. See Myers, *supra* note 37, at 422 (describing how the use of simulated transactions involving individual clients "makes the substantive law less abstract . . . and highlights the values and choices involved in lawyering. In short, teaching practical skills results in a more sophisticated understanding of theory").

#### IV. REFLECTIONS ON SWITCHING TO THE PROBLEM METHOD

If my description of how and why I use the problem method in employment law has been at all convincing, you are now wondering how much up-front work it takes to adopt the method, whether you can pull it off successfully, and what the downsides are to making this switch. As I describe further below, for me, switching to the problem method was an organic and somewhat idiosyncratic process. Rather than provide a blueprint for adoption, in this section I share some personal observations and reflections about my experimentation process that I hope will provide some guidance about the challenges and pitfalls one might encounter in adopting this pedagogy.

##### A. *Investing in a Problem-Driven Course*

The primary concern for faculty in considering any significant change to a course is the potential time investment. I have described adoption of the problem method as a process of turning the course inside out—the key changes are to the structure of class, not the material being taught. For this reason, switching to the problem method is arguably less onerous than adopting a new book and certainly less than prepping a new course. That said, the structural changes are themselves significant, and they have implications for both substantive coverage and student assessment.

The work involved in adopting the problem method falls into three categories: developing and selecting problems, restructuring lesson plans, and managing and assessing students' written work, if any is required. With respect to each of these areas, there are different choices faculty can make to minimize the work, although each entails some sacrifices.

##### 1. Creating and Selecting Problems

The core up-front work of converting to the problem method is developing a cache of problems. How time-consuming this task is depends on the means by which one acquires the problems. I took the path of least resistance; as previously noted, the casebook I co-authored incorporates problems and I simply assigned those as the framework problems for class discussion. The advantage of this was that I did not have to make a special effort to search out or draft new problems in order to make the pedagogical switch. In addition, I had the benefit of already having had a trial run with many of the problems I assigned, having experimented with them as capstone exercises prior to my full-out adoption of the problem method.

There were, however, some disadvantages to relying exclusively on pre-existing problems. The problem method demands a lot of its problems. The fact patterns must be both realistic and sufficiently complex to simulate actual practice; they should challenge students to identify nuances and uncertainties within the law, but not be so difficult as to obscure basic doctrinal principles;

ideally they should also create opportunities for students to interrogate the values of the profession and their role as lawyers.<sup>82</sup> This is a lot to achieve through a single set of facts, particularly where the topic being taught involves multiple rules or sources of law. My casebook, while flush with problems, was not specifically designed as a problem method textbook, and once I moved from using those problems in an additive fashion to making them the centerpiece of class discussion, I discovered the difference.<sup>83</sup> Not every good problem is good for problem-based learning.

In light of this, best practices would suggest that one draft problems oneself, mindful of the particular learning outcomes sought to be achieved with each in terms of rules acquisition, skills development, and an understanding of the lawyer's professional identity.<sup>84</sup> Of course, this process would be unimaginably time-consuming if undertaken for each and every assignment in the course. I am also skeptical as to whether it could be done successfully. Drafting problems this way requires a feat of reverse engineering that may be beyond the capabilities of anyone new to the problem method. All of us who have taught by the traditional method have likely had the experience of only fully realizing the import and limitations of our assigned materials upon actually teaching them. The same goes for discovering the pitfalls and potential of particular problems.

In light of this, I have made peace with what is essentially a trial and error process for selecting and assigning problems. The insights I gain from my first sally with a particular problem show me where it needs to be tweaked for the following year; I may even decide that a particular problem is best abandoned. In the meantime, I am mindful of the risks of my experimentation, and where a problem proves less than effective, I switch up my teaching style, supplementing with a bit of lecture or perhaps resorting to more traditional

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82. See Hirokawa, *supra* note 6, at 13 (asserting that properly designed problems “should stimulate passion for the subject matter and creativity in problem solving,” draw on legal rules that are “relatively well defined and exhibit high expectations for active engagement and sophisticated performance,” and are sufficiently accessible to students “to allow for personal autonomy and self-discovery”).

83. See Carney, *supra* note 11, at 835 (describing problems found in books not designed for problem-based instruction as “elaborate hypotheticals . . . [whose] roots lie strongly in the approach of traditional casebooks”); Moskowitz, *supra* note 3, at 268–69 (describing the “almost-problem-method book” where problems are placed at the end of a chapter or section, “impl[ying] that the problem is a useful afterthought, rather than the focal point of the class”).

84. On the benefits of self-made problems and for tips for drafting the same, see Shapiro, *supra* note 2, at 270–71; Moskowitz, *supra* note 3, at 265–67. For thoughtful discussions of how to develop problems to achieve various learning outcomes through the problem method, see Hirokawa, *supra* note 6, at 12–16; Joseph William Singer, *How Law Professors Can Write a Problem Solving Case*, HARV. L. SCH. (Aug. 20, 2013), <http://blogs.law.harvard.edu/hlscasestudies/2013/08/20/how-any-law-professor-can-write-a-problem-solving-case/>; Van Detta, *supra* note 1, at 61–72.

case-based questioning to bring students up to speed or to take them where I need them to go. Thus, for the first few years, faculty may be forced to select problems with less than complete information and to endure a bit of uncertainty about how things will play out. Since navigating such realities is one of the core lawyering skills that I try to teach my students, it is a burden and a risk that I am happy to endure myself.

## 2. Reengineering Class Discussion and Class Notes

A similar set of challenges presents with respect to how one prepares to teach class under the problem method. Once the problems are selected, the core task for the professor is rethinking the structure of class discussion. If one continues with the same textbook (and it may be wise to do so), there are no new cases to prep, but the way those cases are presented is completely different. The questions one normally poses about the rules, reasoning and analysis in particular decisions must be subsumed within the discussion of the problem.<sup>85</sup> For this reason, notes that lay out and rely on a traditional step-by-step case presentation are of little use.

For my part, I put a good bit of time into rethinking and restructuring my notes the semester I first adopted the problem method. I did this the way I imagine most professors think about teaching new cases—coming up with a series of questions about the problem, imagining how students might answer, and then thinking of more questions that would lead students to those “ah ha” moments we all strive to achieve whatever our pedagogy. In other words, the class preparation process was not significantly different from what I would otherwise employ in preparing new cases, but I had to bring those techniques to bear on a different kind of raw material; and it had to be done from scratch. In addition, I was occasionally compelled to investigate or research certain subtleties of the substantive law or certain aspects of professional ethics to the extent a particular problem raised issues that reached beyond the scope of the assigned cases or my own immediate knowledge.

Ultimately, however, the trajectory of the classes I taught using the problem method bore as little resemblance to my new problem-focused notes as it did to my old case-based ones. Yet I often found that to be true when I taught via the case method as well. The amount of time one invests in preparing notes, as well as the degree to which one conforms to them when

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85. See Carney, *supra* note 11, at 835 (citing the challenge of organizing class discussion as one of the difficulties presented by the problem method); Kurtz, *supra* note 3, at 815 (noting the need to direct students to the important lawyering questions due the wide number of issues raised by a problem and the risk of unfocused analysis); Lung, *supra* note 2, at 740 (noting that while class discussion under the case method “is at least predictable,” class discussion under the problem method “has the potential for much greater open-endedness and indeterminateness . . . because problems usually ask students to explore gray areas of facts, law, or policy”).

teaching is a matter of personal style that supercedes the choice of pedagogy. No matter what one does in advance, driving the discussion through the needle-eye of a problem (just like selecting which problem to teach), at least the first time, requires a small leap of faith.

Of course, things eventually even out. I am slowly discovering in teaching my problems the things one discovers in teaching any material multiple times—which “right” and “wrong” answers students are likely to give, what factual or doctrinal subtleties they tend to miss, even the rogue questions they are prone to ask—so that the flow and content of class discussion is becoming more predictable. Inasmuch as switching to the problem method involves abandoning a particular—and for many of us, very safe—script, there is a new script waiting to be discovered.<sup>86</sup>

### 3. Deliverables and Mid-semester Assessment Opportunities

The decision that has the most bearing on time commitment—and the one where there is perhaps the greatest range of options—is what one elects to do with the problems outside of class. It is entirely possible to assign students the problems purely for class preparation purposes without requiring them to do any written work or committing oneself to reviewing any. If so, the class is no different in terms of assessment time than a traditional case method course where students prepare for class on their own without turning in any assignments and are evaluated based on a single final exam.

Leaving aside whether that is a good assessment model for any course,<sup>87</sup> I do not recommend it in adopting the problem method. Because this is a new pedagogy for many students, they are unlikely, at least initially, to adequately prepare the problem for class if left to their own devices. Requiring students (or at least a subset of them) to draft written answers, and giving them clear guidance as to how to do so, goes a long way toward ensuring a robust class discussion.

More importantly, requiring students to prepare answers helps to harness the problem method’s potential for more active learning. The pedagogical benefits of the problem method are not self-executing.<sup>88</sup> If the students are required merely to read the problem before class and then listen as one or two students answer the professor’s questions, then the experience of the problem method is as passive as the experience of the traditional law school

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86. See Moskowitz, *supra* note 3, at 251–58 (providing a detailed outline of how class exposition generally develops under the problem method in a criminal law course).

87. Cf. ROY STUCKEY, BEST PRACTICES FOR LEGAL EDUCATION 239 (2007) (characterizing the typical assessment methods used by most law school teachers as “abominable”).

88. See Lung, *supra* note 2, at 739–48 (describing the challenges students face in developing transferable knowledge and skills while learning through the problem method).

classroom.<sup>89</sup> Requiring students to write out an answer makes them *do* something in preparation for class and primes them to actually do something once they arrive.<sup>90</sup>

The mechanics of requiring written answers can be handled in various ways to minimize the workload for students and for faculty. A good option is to assign different problems to different students, or even to groups of students, and have each student or group prepare only the specified problems in writing.<sup>91</sup> I have experimented successfully with both individual and group assignments, in both instances requiring the drafting students to post their answers to the course website in advance of class so that other students could read them as part of their preparation.

Having decided what to require, it is then up to the professor whether and to what extent to use students' written answers as an assessment tool. One can do as little as give the written answer "participation credit" and as much as provide written feedback and mark it as a component of the final grade.<sup>92</sup> And of course, the degree to which students will be evaluated determines both the time that will be demanded of the professor as well as the quality of the work he or she will receive.

#### B. *Managing Student Expectations and Teaching "The Law"*

More so than any concerns about time, the biggest challenge in successfully launching a problem-based course is getting the students on board. This is partly a question of buy-in: students are always resistant to deviations from the norm.<sup>93</sup> It is also a test of the professor's ability to achieve the full range of learning outcomes through the new pedagogical model.

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89. See *id.* at 739–40 ("If teachers leave students to learn how to analyze problems principally by hearing and watching other students argue in favor of or against a certain outcome without structuring that discourse with an articulated framework, the pitfalls associated with the case method are likely to be reproduced."). On the learning limits of this style of teaching, see Jessica Erickson, *Experiential Education in the Lecture Hall*, 6 *Northeastern L.J.* 87, 93–94 (2013) (describing how the "soft-Socratic style of teaching common in the contemporary law school classroom does not force students to engage the material sufficiently to ensure deep learning).

90. See Shapiro, *supra* note 3, at 262 (describing how problem preparation in advance of class makes students "both more willing and more adept at answering the questions in class").

91. See Hirokawa, *supra* note 6, at 16 (discussing collaborative discussion and group assignment approach as ways of encouraging student reflection on assigned problems).

92. There may, however, be good pedagogical reasons not to grade written answers, at least at the outset of the course when the teaching method is still new to the students. A useful technique is to require students to do a "rewrite" of their preliminary answer to a problem following the conclusion of class discussion. See Shapiro, *supra* note 3, at 272–73.

93. See James M. Fischer, *Teaching Remedies Versus Learning Remedies*, 39 *BRANDEIS L.J.* 575, 583 (2001) (noting the need to overcome "course culture" in introducing new teaching

My initial experiment with the problem method drew mixed results in terms of student feedback. Course evaluations revealed that at least some students either did not understand the purpose of the pedagogy or were resistant to abandoning the familiar. As one representative and particularly telling comment put it:

The class was focused more on completing problems than actually learning the law... If you don't like learning through hypos, don't take this course.

Ironically, I view this statement less as a criticism of the course than as an illustration of why the problem-method is essential. The student has become so indoctrinated in the case method that he or she equates the rote process of Langdellian-style case recitation with “learning the law.” He or she imagines this process to be a discrete exercise—something that can be divorced from applying the law to real world problems—and, worse still, an end in itself.<sup>94</sup>

That said, it is the job of the professor to debunk that understanding. I had not succeeded for this student and I needed to understand why. In searching for the answer, I found some of the other negative comments I received from students extremely constructive:

I would have liked to talk a little more about the cases we read. We mostly used the hypotheticals... While that was helpful, I think a little more focus on the cases before getting into the problems might have been beneficial.

We never went over the case law that we read, and students were responsible for laying out all the ... rules through application to the hypo. Many times this got very convoluted, .... If LEARNING through hypos is helpful to you, this class will be very enjoyable. However, I need to have a firm understanding of the law BEFORE hypos are any help to me at all.

From statements like these, I drew two insights. First, as a matter of mechanics, when teaching through the problem method it is important to take a step back from the discussion and fold in a fairly detailed, linear explication of the case.<sup>95</sup> Upper-level students have become very adept at the case recitation script, but it is not obvious to them how that exercise intersects with the process of analyzing a problem. I now consciously intervene more in their analysis of the problem, pushing them to incorporate cases and lay out the rules with precision before getting too far into their analysis of the problem and particularly any discussion of non-legal issues. At the same time, I need to signal to the rest of the class that they should listen for and capture that

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techniques among risk-averse law students who “often condemn what they perceive as deviations from the norm” even as they “deplore the sameness of the familiar”).

94. See Carney, *supra* note 11, at 823 (noting that law students believe that, after the first year, “their job henceforth is to master huge amounts of doctrine”).

95. See Moskowitz, *supra* note 3, at 254–55 (providing an example of how a professor can fold a Socratic-style case presentation into a problem-based lesson).

information. Students are trained to start typing automatically when they hear a rule statement during the course of a traditional case recitation, but they do not necessarily recognize the rule or its significance when it is presented in a different context.<sup>96</sup> It is up to me to label it, repeat it, put the elements on the board, and do all of the usual things one does to capture and sew up a particular point for the students.<sup>97</sup>

Second, and relatedly, it is appropriate and even necessary to be explicit with students about one's pedagogical choices in making this kind of shift. I now try to be transparent not only about the overall goals of the problem method, but also about matters as mundane as how I want students to frame and phrase their answers in class. On this subject, I tell them that I will expect a different style of "case" presentation than what they are used to, something not unlike an oral version of a brief in which the case presentation serves as an illustration rather than an end in itself. With respect to my broader objectives, I tell students what the problem method is and why we are using it. I tell them why knowing "the law" alone does not make a good lawyer, and that I want them to be capable of responding holistically to the full range of their client needs and to be capable of exercising judgment and moderating their advice to either ensure employer compliance or protect a worker's position while serving their client's broader interests. In short, I tell them what I want them to learn in class and what I hope they will apply in the world.

Happily, some need no convincing. A portion of my students were eager for a new challenge and preset to embrace anything that changes up what has become a too-familiar routine. As one put it:

[S]he teaches this class by the problem method. This is a fun and different way to conduct a class. It is a very refreshing departure from the normal monotony of school.

A few even appreciated the degree to which the problem method could provide them a deeper understanding of the law and its application in the real world. As one student, familiar with the problem method from other disciplines, remarked:

[Professor] AR conducts her classes like a business school class based on working through problems during class. I've learned so much in this class because of this approach. She's also awesome.

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96. See Lung, *supra* note 2, at 740 ("How to apply a rule to a problem is not self-evident; the skills of application, prediction, interpretation, inference, induction, and deduction must be explicitly named and taught.").

97. See Lung, *supra* note 2, at 745–65 (proposing various techniques for reinforcing student understanding of the "deep structure" of problems and creating transferable knowledge using the problem method); Moskowitz, *supra* note 3, at 254 (noting the need to resort to a traditional case presentation while analyzing a problem in situations where students appear confused about the law).



For the rest, I continue to refine both the pedagogical technique and my sales pitch about the method with the hope that one day they will all think I am “awesome.”

#### CONCLUSION

This Article has shown how adoption of the problem method can add value to the Employment Law course and the larger law school curriculum by creating opportunities for more practice-oriented learning. The traditional case method teaches doctrine in the abstract; the problem method teaches doctrine in context. Consequently, students gain a richer understanding of the law’s complexity and the choices lawyers make in seeking to address the full range of their client’s interests. The problem method also serves as a means of bolstering students’ transactional lawyering skills, by bringing their attention to the role lawyers play in advising clients in advance of litigation and even in advance of any dispute. Finally, the problem method, like any change in pedagogy, can provide a much-needed way of increasing student engagement and enlivening class discussion in the upper-level curriculum.

Of course, the problem method is neither a watershed nor a unitary solution to the challenges facing legal education. There are certainly bigger and better ways to improve student learning both in the workplace law field and beyond, and, to their credit, many law schools are doing the hard work of developing and implementing large-scale reform. What the problem method provides is a low-cost way of enhancing the Carnegie apprenticeships of practice and professionalism that is accessible to traditional teachers and amenable to the large-class format. By making this modest intervention, the professor takes a small but valuable step toward the goal of graduating more practice-ready lawyers, while at the same time re-energizing the classroom and one’s own approach to teaching.